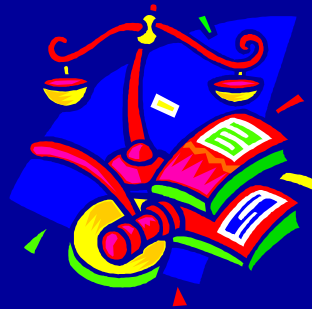


# Freedom of Information Act Exemption 5



# Exemption 5 Threshold

- “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”
- 3-Part Threshold:
  1. Inter-agency or intra-agency
  2. Letters or memos
  3. “Not available”--privileged

# Threshold Issues

Inter-agency (between) or intra-agency (within)

- A. Strict construction – literal interpretation of the statutory words
- B. Functional Test (Klamath Water Users case):
  - Outside consultants
  - Other solicited advice
  - Longstanding practice even though no formal relationship
  - Unsolicited advice
  -

# Threshold Issues

- 3 Parts (continued)

2. Letters or memos

3. “Not available”: information normally privileged in civil discovery

# Threshold Issues

## 3 Main Privileges

Deliberative Process Privilege

Attorney Work Product Privilege

Attorney-Client Privilege

Other privileges recognized under Ex.  
5 if “well-settled”

# Deliberative Process Privilege

- Three rationales:
- Designed to encourage open and frank discussions in decision-making process
  - Do not want to “chill”
  - Protect candor of the decision makers

# Deliberative Process Privilege

- Protects against premature disclosure of proposed policies
- Protects against public confusion by disclosing alternative reasons for agency decision not accepted by decision makers

# Deliberative Process Privilege

- Two Requirements:
  - The information must be predecisional—a timing question
  - The information must be deliberative—a character question
  - Must have both requirements to claim privilege



# Deliberative Process Privilege

- Predecisional: prior to the adoption of an agency policy/decision
  - Does not include final agency decisions and statements of agency policy
  - Does not include post-decisional statements that explain decisions
  - Predecisional documents can lose their character as such

# How to determine if document is deliberative:

What decision-making process is involved;

Who is issuing document?

What is decision and who is final decision-maker?

What role does document play in the course of that process?

Identify relationship between author and recipient

# How to determine if a document is deliberative:

- Analysis, evaluations, advice, recommendations
- Cannot protect facts, only the deliberative material
  - Except when facts reveal deliberative process or are so intertwined with the deliberative process that they would reveal process

# How to determine if a document is deliberative:

- Drafts:
  - You can protect a draft document, including the facts, even if the draft is identical to the final version
  - Drafts are generally considered deliberative, but stamping “Draft” on a final document will not on its own provide protection from disclosure

# Attorney Work Product Privilege

- Purpose: to protect adversarial trial process by insulating attorney's preparation from outside scrutiny
- Two elements:
  - Protects material prepared by an attorney, or at the direction of an attorney, and
  - The material is prepared in anticipation of litigation

# Attorney Work Product

- “Anticipation of litigation”
  - Litigation does not have to occur, but there must have been a reasonable anticipation (concrete possibility)
  - Includes civil, criminal and administrative litigation
  - Government has burden of proving anticipation of litigation

# Attorney Work Product

- Limitations:
  - Works only in litigation context
  - Applies only to material prepared by an attorney or at his/her direction
  - Applies to all of the work product, including the facts
  - NO time limits—applies even after the case settles/closes

# Attorney-Client Privilege

- Purpose: Sound legal advice or advocacy depends on the attorney being fully informed by a client.
- Two elements:
  - An attorney client relationship
  - A confidential communication
    - Related to legal matter for which client seeks professional advice



# Attorney-Client Privilege

- Protects facts divulged by client to attorney and opinions given by attorney based on those facts
- Confidentiality within government extends to lower echelon employees

# Attorney-Client Privilege

- NO time limitation with this privilege  
UNLESS confidentiality is destroyed
- No need for litigation to be pending/anticipated

# Other Privileges

- Must be well-settled or well-recognized
- Aircraft accident witness statement privilege
  - Witness statements generated during AF aircraft accident investigation:  
United States v. Weber Aircraft Corp.,  
465 U.S. 792, 799-800 (1982)

# Other Privileges

- Government commercial privilege
  - Government bid on contract protected until time of harm passes: Federal Open Mkt. Comm. V. Merrill, 443 U.S. 340 (1979)

## Realty appraisal privilege

Government generated appraisal in course of soliciting buyers for its property

# Other Privileges

- Settlement negotiation privilege
  - Remains an unclear area under Exemption 5, especially after the Supreme Court decision in Klamath Water Users (2001)
  - Refer to DOJ Freedom of Information Act Guide

